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Supreme Court, U.S.
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No. 05-9222

In the Supreme Court of the United States

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON, SUPERINTENDENT,
STAFFORD CREEK CORRECTIONS CENTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW OFFICES OF ROBERT A. RATLIFF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Law Offices of Robert A. Ratliff is a for profit professional organization actively engaged in the practice of law. The senior and founding partner is Robert A. Ratliff, a member of the Bar of this Supreme Court of the United States.

Robert Ratliff, by and through his law offices, is nationally recognized for professional representation in the areas of post conviction litigation and federal criminal defense. A tireless advocate of the constitutional rights of individuals, Mr. Ratliff has represented clients charged in criminal matters throughout the United States and overseas. At every opportunity, in the courtroom and before the appellate bars, in the classroom and in the community, Mr. Ratliff has fought for the unalienable rights of individuals.

The Law Offices of Robert A. Ratliff has a long-term interest in the selection and resolution of important criminal justice cases by this Court. In that regard, this brief will discuss the retroactive nature of the holdings in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000)(hereinafter referred to as "*Apprendi*"), Blakely v.Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)(hereinafter referred to as "*Blakely*") and United States v. Booker, 543 U.S. 220,125 S.Ct. 738, 160 L.Ed.2d 621(2005)(hereinafter referred to as "*Booker*"), the ongoing

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[1] This brief was authored in its entirety by counsel listed on the cover, and no counsel for a party authored this brief, in whole or in part. No person or entity related to either party to the underlying case made a monetary contribution to the preparation or submission of this brief. The consents of the parties to the filing of this brief are being filed herewith.

and irreparable burden created if these holdings are not viewed in light of the well-established rules in Yates v. Aiken, 484 U.S. 211,108 S.Ct 534, 98 L.Ed.2d 546 (1988) and Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 344, 109 S.Ct. 1060 (1989), and the need for prompt review of the question presented by the petition.

Of particular importance to Mr. Ratliff are constitutional protections for a criminal defendant enumerated in the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment to the Constitution of the United States, and specifically the centuries' old civic value of the inviolate role of the jury in the determination, beyond all reasonable doubt, of all elements of a criminal charge.

INTRODUCTION AND SUMMARY OF ARGUMENT

The key constitutional principles enumerated in *Apprendi, Blakely, and Booker*, together with their respective progeny, are traditional principles of the common law of criminal jurisprudence. While the introduction of indeterminate sentencing schemes in the 1980s, a process originally sanctioned by this Court, was seen as an idyllic power sharing process among the three branches of government, the implementation and periodic modifications of the sentencing scheme have shown it to be an imperfect, imbalanced, and unconstitutional vehicle representing a power assertion by the legislative branch over the judiciary and a restriction in constitutional protections for an accused.

Now that the key Fifth and Sixth Amendment protection have been reasserted by this Court in *Apprendi, Blakely, and Booker*, due process requires a specific holding by the

Supreme Court that these principles are available for retroactive application on collateral review. Though Justice O'Connor specifically suggested as much in her dissent in *Blakely*, the clarity required under the statutes for retroactive collateral application of these holdings of substantive due process must come from the majority of the Court. The established rules for determining retroactive application, as permitted in Teague and mandated under Yates, indicate that the holdings of *Apprendi, Blakely, and Booker* should be retroactively applied. Due process requires such retroactive application. Now it is simply the time for the Court to conform its rules to the Congressional prerequisite for collateral retroactive application: specifically that the *Blakely* holding represents a reasserted rule of substantive constitutional law, made retroactive to cases on collateral review by the Supreme Court.

While the predominant question in the underlying matter may on its face appear to be whether *Blakely* impacts the imposition of consecutive or concurrent sentences, the greater questions are the ones certified to the court as being presented: (1) Is the holding in *Blakely* a new rule, or is it dictated by the holding of *Apprendi*? And (2) If *Blakely* is, a new rule is its holding retroactive?

In light of these questions, the lower courts are inconsistently and illogically opining that the *Apprendi, Blakely, Booker* principles are important, substantive due process statements . . . but just not for collateral application. In other words, the Ninth Circuit has opined that constitutional fidelity is a matter of timing and not universal application. Many other defendants, from all the judicial circuits, have been similarly addressed. Through this brief and others, this Court is asked for consistency in application, fidelity to constitutional principles, and loyalty to the core

values of over two hundred years of constitutionally protected criminal jurisprudence.

ARGUMENT

Criminal jurisprudence under the Constitution of the United States stands on certain principles understood to be communally guaranteed by our social compact in light of the excesses experienced by our forefathers under King George III and his Parliament. These principles include Sixth Amendment guaranties to a "speedy and public trial, by an impartial jury," and "to be informed of the nature and cause of the accusation." Against the common law pillar that guilt can only flow from a unanimous determination by a jury beyond a reasonable doubt, it is the jury, and its operating principles of the Fifth and Sixth Amendments, that have established our enviable philosophy and practice of criminal law.

Over the past half-decade, the American judiciary has grappled with the modern effects of sentencing guidelines, as well as the imposition of such guidelines on the pillar principles of constitutional criminal law. Perhaps one of the reasons for the judicial challenges was the inclusion in the modern Federal sentencing guidelines of the concepts that sentencing factors, factors that could increase a sentence, were to be determined by the sentencing judge based on the reduced standard of proof of a preponderance of the evidence. See, U.S.S.G. Chapter 1, Part A, introduction, comment (2) and (4)(a).

When Congress first established the current sentencing guidelines, this Court held the guidelines to be constitutional based upon a separation of powers discussion. In Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d

714 (1989), the Court first reviewed the constitutionality and propriety of the federal sentencing guidelines as proposed in the Sentencing Reform Act of 1984. Ultimately, Justice Blackmun, writing for all of the justices except for Justice Scalia who presciently dissented, opined that the subject of criminal punishments was one not constitutionally mandated to any one of the branches of government. Instead, it was noted, Congress had moved toward a "three-way sharing" of sentencing responsibility. Under the indeterminate-sentence system created in 1984, Congress defined the maximum punishments for certain crimes, the judge imposed a sentence within the statutory range, and the Executive Branch's parole official eventually determined the actual duration of imprisonment. See, Williams v. New York, 337 U.S. 241, 248 (1949). See also Geraghty v. United States Parole Comm'n, 719 F. 2d 1199, 1211 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); United States v. Addonizio, 442 U.S. 178, 190 (1979); United States v. Brown, 381 U.S. 437, 443, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965) ("[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.") It was based upon this balanced approach and respect for the separation of powers that the Court held the guidelines constitutional. Matters now though have changed.

Over the past several years, Congress has moved past this balanced approach of sharing responsibility. Ultimately now, Congress has taken over the judiciary's role in the sharing of delegated authority in determining punishments for crimes.

(For example, in adopting the so-called Feeney Amendment, Congress has chilled the freedom of federal judges to impose sentences deemed appropriate. Under the Feeney Amendment, the reporting provisions of 28 U.S.C.

§ 994(w) were modified in that the Chief Judge in each district *must* submit to the Sentencing Commission "a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include the presentence report." 28 U.S.C. §994(w)(1). Furthermore, 28 U.S.C. § 994(w)(2) provides that the Sentencing Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports. With such legislation, no Federal judge can impose a sentence above or below the Congressional "guidelines" without imposing serious review by what was a coequal branch of the Federal government. This chilling legislation of a free judiciary has moved the Sentencing Guidelines from being a constitutional exercise of governmental goals to an unconstitutional aggregation of power in only one branch.)

Consequently, these mandatorily applied guidelines were confirmed to be unconstitutional as applied by this Court in *Booker*. This fact, that the federal sentencing guidelines were unconstitutionally permitting defendants to be sentenced far in excess of the actual crime charged or admitted to, has been clear, although largely ignored, throughout several opinions of this Court. *See generally*, Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court's pronouncement in *Booker* can no longer be ignored. Rather than correcting the constitutional problem on a piecemeal basis, the criminal justice system requires systemic correction, both prospectively and retroactively.

Fairness and integrity require the retroactive application of the principles outlined in *Apprendi, Blakely, and Booker*. In fact, so does this Court's own precedents. And the effect, as reflected in the Appendix, would be material.

APPRENDI, BLAKELY AND BOOKER HOLDINGS MEET THE STANDARD FOR RETROACTIVITY

Two prior cases of this Court establish the standard for retroactivity and whether *Apprendi, Blakely*, and *Booker* meet the standard. In Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 344, 109 S.Ct. 1060 (1989), this Court generally prohibited retroactive application of new procedural rules for cases on collateral review. Given with the nature of their holdings, though, many courts have wrestled with the Teague analysis to determine whether *Apprendi, Blakely*, or *Booker* are new procedural rule that should be applied retroactively. See, Morris v. United States, 2004 WL 1944014 (C.D. Ill. Sep 01, 2004), United States v. Okai, 2005 WL 2042301 (D. Neb. Aug. 22, 2005) and Garcia v. United States, 2004 U.S. Dist. LEXIS 14984 (NDNY Aug. 4, 2004) However, at the last step of most Teague retroactivity analysis, logic falls prey to a common mistake of suggesting that the Supreme Court's decision in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004) conclusively foreclosed the issue. In Schiro, though, this Court was only concerned with the retroactive application of the procedural right to a jury. [2]

In her dissent in *Blakely*, Justice O'Connor noted that "all criminal sentences imposed under the federal and state

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[2] And in any case, the majority's analysis was limited to the Ring rule.

guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack" because of the Court's decision in Teague. In Teague, the Court noted that new rules of constitutional procedure would apply if the new rule involves "those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 311. Such rules vindicate two discreet concerns: the fundamental fairness of the underlying procedure; and the accuracy of that underlying proceeding. Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). As this Court has held, a trial court's misallocation of fact finding responsibility (judge versus jury) does not warrant retroactive application, Schriro, 124 S. Ct. at 2523, the same cannot be said for the retroactivity of application of a preponderance of evidence standard as opposed to a reasonable doubt standard. See Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct.339, 53 L.Ed.2d 306 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift the burden of proof to defendant). Application of a lower standard of proof may be an error that significantly affects factfinding accuracy and undermines society's confidence in the result of the trial. See Schiro, 128 S. Ct. at 2523. In effect, it addresses a substantive right and not simply one of process.

This interplay of Teague and the issues raised by *Apprendi-Blakely-Blooker* cannot be understated. Based on a selective reading of Teague and limited prior Court decisions, lower courts have opined that the holdings of *Apprendi-Blakely-Booker* represent rules procedural in nature and therefore "new" rules for purpose of retroactivity. See, United States v. Gentry, 432 F.3d 600, 603 (5th Cir. 2005)("The Booker rule merely reallocates decision-making authority...It is concerned with the identity of the decision-maker and the amount of evidence required for a

sentence. . .Therefore the Booker rule is procedural in nature.") **This type of holding, replete throughout the circuits now, conflicts directly with this Court's prior pronouncement that determinations of burden of proof and presumptions of who carries such burdens are substantive rules to be retroactively applied.** See, Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct.339, 53 L.Ed.2d 306 (1977)

As indicated then, the complex analysis of Teague does not have to be applied. In Yates v. Aiken, the Supreme Court had the opportunity to review when new rulings should be made applicable to cases on collateral review. In reaching its conclusion, this Court looked to a prior decision of the Court to distinguish between new rules of law and new applications of already well established principles. The Yates court looked to the opinion of Justice Harlan in Desist v. United States, 394 U.S. 244, 89 S.Ct 1030, 22 L.Ed.2d 248 (1969), where Justice Harlan stated,

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very

> difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 89 S.Ct., at 1041.

The Yates Court recognized that this distinction between new rules, and the application of old rules to new situations, was well settled.

> We stated in United States v. Johnson, 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982): "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. **In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."** (*emphasis added*) See also Truesdale v. Aiken, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (per curiam); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Lee v. Missouri, 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (per curiam)." Yates at 215, fn 3.

That defendants have a due process right to be sentenced according to accurate information, and found guilty of every element of the offense beyond a reasonable doubt, is a well established, longstanding principle of our system of justice. In *Booker*, Justice Stevens wrote,

> It has been settled throughout our history that the Constitution protects every criminal defendant 'against

> conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

Booker, at 747

For reasons explained in Jones, Apprendi, and Ring, the requirements of the Sixth Amendment are and have been clear.

As this Court further recognized in *Booker* and *Blakely*, while in some cases jury fact-finding may impair the most expedient and efficient sentencing of defendants, the interest in fairness and reliability protected by the right to a jury trial--a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment--has always outweighed the interest in concluding trials swiftly. *Blakely*, at 2542- 43. As Blackstone put it: "[H]owever convenient these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though

begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns." 4 Commentaries on the Laws of England 343-344 (1769). See, *Booker* at 755.

As acknowledged by Justice Stevens, the right to be accurately sentenced and found guilty of each element of the offense has been well established for centuries. It is not a new rule. And it is a substantive rule of law. Even in the late 18th century, the Fifth and Sixth Amendments were but "recent" guarantees of these long established rights. To artificially block the retroactivity of these constitutional principles is to deny bedrock principles of our centuries-old criminal justice system to individuals as diverse as those referenced in the Appendix.

Under the backdrop of this historical precedent which even predates Blackstone, it is clear that the rule established by *Apprendi, Booker, and Blakely* must be retroactively applied on collateral review to every defendant unconstitutionally sentenced under the federal sentencing guidelines.

Society has long recognized a necessary link between punishment and crime. Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting), citing *Apprendi* ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). "Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?" Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting).

If a statute annexes a higher degree of punishment based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 480, quoting J. Archbold, Pleading and Evidence in Criminal Cases 51 (15th ed. 1862).

As this courageous Court saw in *Booker*, the sentencing guidelines cannot supersede the United States Constitution. The guidelines should not be used to accomplish an "end-run" around the fundamental right to trial by a jury and to usurp the role of the jury. If the jury finds a defendant guilty of a range of drug amounts that could be as low as five kilograms, the district court should not be permitted to use the sentencing guidelines to ignore that verdict, take the jury's role, find responsibility for a higher drug amount, and punish based upon that extra-jury determination at a standard lower than proof beyond a reasonable doubt. See Anderson v. Fuller, 455 U.S. 1028, 1032, 102 S.Ct. 1734 (1982) (Burger, C. J., dissenting) (noting that federal courts should not usurp the function of a jury in finding facts).

This Court's prior decisions in *Apprendi*, *Blakely*, and *Booker* did not expressly announce retroactivity; however, the significance of the holdings combined with the Court's decision in Yates and Teague, showed that the rulings must be retroactive to cases on collateral review. Should this court fail to apply the rule issued in *Blakely* retroactively, an *ex post facto* violation will have been committed. An ex post facto law is one that "makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action, or that *aggravates* a *crime*, or makes it *greater* than it was, when committed." Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)(emphasis in original). The Federal Constitution

specifically bars Congress from adopting any *ex post facto* laws. U.S. Const. Art. I §9, Cl. 3. If this court fails to apply the *Blakely* decision retroactively, but only prospectively, an *ex post facto* violation will have occurred. An accused's crime, for which collateral relief is sought, will have been aggravated from the time that it was committed.

In *Apprendi*, and its progency, the strength of our constitutional system was reaffirmed. This Court recognized the fundamental defects that had evoleved in our justice system due to the mandatory sentencing guidelines and its inherent punishment enhancements. Now is the time to complete this affirmation.

Though allowing prior cases, against which these defects have applied, to remain unchecked and uncorrected would be efficient, it would not be right. To bar the retroactive correction on collateral review of an unconstitutional process, when such defendants raised the error on direct appeal and yet were ignored, would be hypocrisy. And what does this Court then say to the descendants of our common forefathers? Yes, our system was applied incorrectly. We will do better in the future. To those who have suffered from these unconstitutional applications, fret not. It is only time, your time and lives, that are affected. And, of course, our integrity and fidelity to our inherent principles remain questioned.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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Dated: August 24, 2006

APPENDIX

CASE EXAMPLES

United States v. Crishone Crystal Johnson
United States District Court
for the Western District of Virginia
Case Number 5:96-00022-01

In this cocaine conspiracy case, the defendant was found guilty on all five counts of her indictment after a plea of not guilty. A 39-year-old African American mother of one, and first time nonviolent offender, Defendant Johnson is serving a twenty-year sentence imposed in 1997 against her, a sentence determined based upon the judicial determination of drug quantity and of other enhancements.

The drug quantity in Defendant Johnson's case was determined by the United States Probation Officer who prepared her Presentence Investigation Report. He testified in open court, but only before the judge, how he calculated the drug quantity, a calculation determined from his judgment after listening to the witnesses in the case testify before the jury. Not only did the jury not calculate the drug quantity, the fact that would determine the extent of incarceration, but the judge did not even make an independent determination. In this case, the judge determined drug quantity based upon hearsay testimony of the probation officer! Further, the standard of proving this determination was the preponderance of evidence and not the burden of beyond a reasonable doubt.

After the *Booker* findings by this Court, it is clear that Defendant Johnson's sentencing violated her constitutional right to be tried by a jury of her peers, to have each and every element impacting incarceration determined by that jury, and for that jury to base its decision on the strict standard of beyond a reasonable doubt. Such a substantive due process protection did not occur. If it had, it is very likely that her sentence would have been substantially less than the two decades' time of incarceration received.

In recognizing this shortfall, Presiding Judge James H. Michael, Jr. lamented at sentencing:

> I'll tell you I agree with you, but it doesn't make any difference because I can't deviate from these guidelines under the Congressional instructions. As far as departing downward is concerned, I can tell you right now that if I did it in this case, it would be reversed and sent back to me. I have departed downward perhaps five times, four times . . . in 10 or 12 years or since the guidelines came into effect. Every blessed time, I have been reversed and the case sent back for resentencing. In other words, the Court of Appeals in this and other circuits have said to the District Courts, you all abide by the guidelines, period. Otherwise, you're going to be resentencing. If you have been looking at those cases, you'll see the same thing I see.

Clearly, Judge Michael believed, and from prior appellate review knew, that the unconstitutional guidelines were improperly required to be applied, by rote, with no discretion from the sentencing judge. To exercise his constitutional authority as judge would lead to reversal, at the very least. This recognition is reversible error in and of itself, as

imposition of an unconstitutional sentencing structure undermines the very substantive due process required for any constitutional criminal proceeding. Correction of these circumstances, while requiring retroactive application of *Blakely* and *Booker* in collateral proceedings corrects this error in our substantive due process.

United States v. Mary Catherine Ritcherson
United States District Court
for the Southern District of Iowa
Case Number 90-9-2

One of two defendants in a drug conspiracy case, Defendant Ritcherson, a 45-year African American mother of one was convicted on a one count indictment against her for conspiracy to distribute heroin, cocaine, and cocaine base. The United States District Court for the Southern District of Iowa imposed a sentence of 360 months, five years of supervised release, and a $20,000.00 fine, a sentence determined based upon the judicial determination of drug type, quantity, and of other enhancements.

The drug type and quantity in Defendant Ritcherson's case was determined by the United States Probation Officer who prepared her Presentence Investigation Report. He calculated drug quantity based upon converting cash seized to drug grams, assuming drug type, all being determined from his judgment after listening to the witnesses in the case testify before the jury. Not only did the jury not calculate the drug quantity, or determine the drug type, the facts that would determine the extent of incarceration, but the judge did not even make an independent determination. Further, the standard of proving this determination was the preponderance of evidence and not the burden of beyond a reasonable doubt.

Judge Charles Wolle at sentencing offered to receive any evidence that would impact sentencing; however, he maintained that the information contained in the presentence investigation report stood as a rebuttable presumption, subject only to being challenged based on evidence in the record from trial and additional evidence at sentencing. *See*, page 15, Sentencing Transcript. Then, using the standard of the preponderance of the evidence, the judge accepted the conversion methodology of cash into heroin, as offered but challenged, by the presentence report.

After the *Booker* findings by this Court, it is clear that Defendant Ritcherson's sentencing violated her constitutional right to be tried by a jury of her peers, to have each and every element impacting incarceration determined by that jury, and for that jury to base its decision on the strict standard of beyond a reasonable doubt. Such a substantive due process protection did not occur. If it had, it is very likely that her sentence would have been substantially less than the three decades' time of incarceration received.

United States v. Bernard Barnett
United States District Court
for the Southern District of New York
Case Number S5-90-CR-913(06)

The Defendant, Bernard Barnett, a married African American and father of three, was charged as a co-conspirator to an extensive conspiracy to possess heroin, crack, and cocaine, with an intent to distribute such drugs. He was 39 years of age at sentencing. Mr. Barnett was also charged with possession, with an intent to distribute, crack cocaine and heroin, as well as maintaining a place for narcotics distribution. In addition, this defendant was charged with

possessing a weapon in relation to a drug trafficking crime and possessing a weapon by a convicted felon.

Defendant Barnett was found guilty by a jury of these counts on December 6, 1991. Since his sentencing on August 13, 1992, he has been serving a life term, imposed by the United States District Court based upon the then prevailing recognition of a mandatory nature of the federal sentencing guidelines under the Sentencing Reform Act of 1984. See, page 15, Sentencing Transcript. This sentence represents the top of the Guidelines range. It also represents a sentence which exceeds the statutory maximum to be imposed on individuals who are career offenders as such individuals are defined under U.S.S.G. 4B1.1. See, United States v. LaBonte, 520 U.S. 751, 137 L.Ed.2d 1001, 117 S.Ct. 1673 (1997).

Using a high standard but relying solely on the decision of the judge, Mr. Barnett's sentence was enhanced and determined by a judicial application of 21 U.S.C. 841(b)(1)(A), a process that under Apprendi, Booker, and Blakely must be reserved to the jury. In addition, the calculation of drug quantity, determined and applied by the judge alone, exceeds the judicial role and obviates the role of the jury, as discussed in Blakely. In fact, the defendant was convicted on a general jury verdict after the presiding judge informed the jury that drug type and quantity was irrelevant for a jury determination. However, the count of offense references different types of drugs. Without a jury determination as to type and quantity, especially after conflicting testimony was given as to such matters, the substantive due process issues raised in Blakely arise in this case to taint the entire conviction and sentence.

From the tone and tenor of the transcripts, it is clear that Judge David Edelstein, the sentencing judge, did not care much for Defendant Barnett. His imposition a life sentence was, the judge declared, to be an important statement given the defendant's acts, character, and history. Nevertheless, how Mr. Barnett is convicted and sentenced is as important as whether he is so convicted and sentenced. Under *Blakely*, Mr. Barnett's sentence would need to be revisited so that his criminal proceedings were based in constitutional due process.